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8 UNITED STATES DISTRICT COURT

9
10 DISTRICT OF ARIZONA

11 In Re Bard IVC Filters Products
Liability Litigation

12 No. MD-15-02641-PHX-DGC

13 **SURREPLY IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISQUALIFY THOMAS KINNEY, M.D.
AS AN EXPERT FOR PLAINTIFFS**

14
15 Plaintiffs provide this surreply in support of their opposition to Defendants' Motion
16 to Disqualify Thomas Kinney, M.D. as an Expert for Plaintiffs ("Motion," Doc. 5677)
17 and, specifically, to supplement the record as a result of Dr. Kinney's deposition that was
18 taken after completion of the briefing on Defendants' Motion.

19 Bard took the deposition of Dr. Kinney in this matter on June 17, 2017,
20 approximately one month after briefing was complete on its Motion to disqualify him. In
21 the Motion, Bard contends that Dr. Kinney was its consultant to whom it provided
22 protected, confidential information. In opposition to that Motion, Dr. Kinney provided a
23 sworn declaration in which he attested that he had not been retained by Bard for any
24 purposes related to this litigation and that had not received any information from Bard that
25 related to the mental impressions of its counsel, legal theories, liability theories, or
26 relating at all to the subject matter of his report in this litigation.

27 Despite its claims in the Motion and Dr. Kinney's sworn declaration refuting them,
28 Bard failed to examine Dr. Kinney at his deposition regarding those subjects or to produce

1 any evidence that Dr. Kinney received from Bard any protected information that should
 2 result in his disqualification in this MDL. To the contrary, despite the elephant in the
 3 room, Bard did not examine Dr. Kinney at all regarding what work he did for Bard as a
 4 consultant or the information or types of information he received from Bard in that role.
 5 Nor did it mark his declaration as an exhibit or ask him any questions about it.

6 Plaintiffs, on the other hand, examined Dr. Kinney regarding his work for Bard,
 7 and that testimony provided further evidence that he was not, as Bard contends, a
 8 litigation consultant with access to confidential information or attorney mental
 9 impressions related to this litigation. Plaintiffs have attached the relevant excerpts of Dr.
 10 Kinney's deposition testimony as Exhibit A to this Surreply. In relevant part, he testified
 11 that his primary contact at Bard was Janet Hudnall but that he did speak to Richard North,
 12 Rob Carr, and Dr. Ciavarella. Other than Richard North, all of these individuals are
 13 corporate, non-legal employees of Bard. Further, he expressly disclaimed any contact
 14 with Richard North relating to the lawsuits on which he had been retained. *See id.* at
 15 312:3-6. Rather, Mr. North "contacted [him] about having the phone conversations with
 16 helping physicians" having problems with filters. *Id.* at 312:8-19. In that role, Dr. Kinney
 17 was "asked to give advice about particular [medical] cases. Usually it was about
 18 retrievals, difficult retrievals." *Id.* at 313:11-13. He considered himself to be a
 19 "consultant giving a second opinion to a physician having a problem with a filter." *Id.* at
 20 313:18-21. And, he would prepare progress notes for those calls of the advice that he
 21 gave to the physician. *Id.* at 313:22-314:5

22 In his errata, Dr. Kinney noted that, while Richard North set up his arrangement to
 23 help physicians and Bard support staff with problem clinical cases, Mr. North did not
 24 participate in the individual calls. Bard personnel would put Dr. Kinney in contact with
 25 the specific clinician involved with the problem case. *See Declaration, attached as Exhibit*
 26 *B.*

27 Dr. Kinney also produced at his deposition the one and only "report" he did for
 28 Bard regarding the case in which he is alleged to have been a consulting expert (Mattes

1 versus Bard). Plaintiffs have not reviewed that report; Plaintiffs understand that it has
2 been filed in camera. Plaintiffs advised counsel for Bard that Dr. Kinney was prepared to
3 testify about the circumstances of his involvement and the purpose of his report. Bard,
4 however, chose not to examine him on those issues or anything relating to the report. *See*
5 *id.* at 61:8-62:15.

6 In sum, Dr. Kinney's deposition testimony only further supports his declaration in
7 opposition to Bard's Motion. For the reasons set forth in Plaintiffs' Opposition, Bard's
8 continued failure to adduce any evidence that it provided Dr. Kinney with protected
9 information relevant to the subject matter of his report or this litigation is fatal to its
10 Motion.

11 RESPECTFULLY SUBMITTED this 12th day of July 2017.

12 GALLAGHER & KENNEDY, P.A.

13 By:s/ Paul L. Stoller

14 Mark S. O'Connor

15 Paul L. Stoller

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20 *Co-Lead/Liaison Counsel for Plaintiffs*

21

22 **CERTIFICATE OF SERVICE**

23 I hereby certify that on this 12th day of July, 2017, I electronically transmitted the
24 attached document to the Clerk's Office using the CM/ECF System for filing and
25 transmittal of a Notice of Electronic Filing.

26 /s/ Deborah Yanazzo

EXHIBIT A

June 17, 2017

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA
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4

5 IN RE BARD IVC FILTERS

6 PRODUCTS LIABILITY

MD-15-02641-PHX-DGC

7 LITIGATION
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12 VIDEOTAPED DEPOSITION OF THOMAS KINNEY, M.D.

13 La Jolla, California

14 Saturday, June 17, 2017

15 Volume I
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22 Reported by:
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24

Gail E. Kennamer, CSR 4583, CCRR

June 17, 2017

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1 that to us. I think that was given in camera to the
2 judge, but I told him to bring anything he had on that
3 case, and that's what he brought, so I just --

4 MR. BROWN: Okay.

5 MR. LOPEZ: I don't know how you guys are
6 handling that, to be honest with you, but --

7 MR. BROWN: All right.

8 MR. LOPEZ: -- he has it.

9 BY MR. BROWN:

10 Q. All right. So Dr. Kinney brought with him a
11 document entitled, "Mattes versus Bard. Comments by
12 Dr. Thomas B. Kinney, M.D." and it's a three-and-a-half
13 page, single-spaced document.

14 MR. LOPEZ: I guess the point is you claimed
15 privilege I think to that before.

16 MR. BROWN: So am I correct that you --
17 plaintiffs have not seen this document?

18 MR. JOHNSON: We have not reviewed it or seen
19 it.

20 BY MR. BROWN:

21 Q. Okay. Doctor --

22 MR. LOPEZ: We were advised he had it. We told
23 him because of your objection, we were not allowed to
24 review it or discuss it with him.

25 BY MR. BROWN:

June 17, 2017

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1 Q. Doctor, have you provided this document that I
2 just described, Mattes versus Bard, to any counsel for the
3 plaintiff?

4 A. I provided that to Laura.

5 Q. Who is Laura?

6 A. I don't remember her last name. Sorry.

7 Q. Do you remember what law firm she works for?

8 A. No. Sorry, Matthew, I don't.

9 MR. LOPEZ: I can tell you. He did provide it,
10 but we -- I have talked to Laura about this. She was
11 instructed not to review it.

12 MR. BROWN: Okay.

13 MR. LOPEZ: In other words, we didn't -- we
14 didn't reference it in our opposition to the DQ motion.
15 Its content is still protected.

16 MR. BROWN: I'm going to go ahead and mark as
17 Exhibit 5 --

18 MR. LOPEZ: Just so there is no
19 misunderstanding, we do not agree it should be a protected
20 document. It's just that we are honoring the fact that
21 you guys have done that.

22 MR. BROWN: Okay.

23 MR. LOPEZ: We think it's clearly a document
24 that's been put at issue. Any claim by you all that it
25 somehow is privileged is ludicrous. Best word I can think

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1 MR. JOHNSON: Form objection. Question is also
2 vague.

3 THE WITNESS: It's a suggestion, but there's --
4 I don't see them giving a lot of details about how they
5 are doing that. It's -- It's a one-sentence structure
6 with no specifics.

7 We kind of talked about that, you know, like we
8 talked about whether there is, I don't know, prospective
9 randomized studies, the grades of those versus case
10 studies. There is no mention about how that's done here.
11 I guess we're making assumptions.

12 MR. BROWN: Okay. Thank you, Doctor. I don't
13 have any other questions for you.

14 THE WITNESS: Thank you, I think.

15 MR. JOHNSON: I will have some questions for
16 him. I won't be too long.

18 -EXAMINATION-

19 BY MR. JOHNSON:

20 Q. Doctor, did I understand you to tell us that for
21 a number of years, Bard had you act in different
22 capacities on their behalf?

23 A. I did many different things for Bard. I did --
24 I trained physicians on how to put filters in and take
25 them out.

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1 I did animal studies to evaluate new designs.

2 I participated in the patent lawsuit that had to do
3 with dialysis catheters.

4 And then I did phone conversations with them, in
5 contact with their clinical support staff or sales
6 personally about particular problems.

7 Q. All right. And you did that for a number of
8 years?

9 A. From about 2004 to about 2007 is what I recall.

10 Q. Who were your primary contact people with Bard?
11 You mentioned Janet Hudnall, for example.

12 A. Hudnall was one of my major contacts. But I do
13 remember talking to Richard North, I think. He was the
14 guy -- he was the person that contacted me about the phone
15 conversations, if I remember right.

16 It could have been Dr. Civarella. I don't remember.
17 It's quite a while ago now.

18 Q. And did you mention Rob Carr?

19 A. You know, Rob Carr was always in the background,
20 but he -- I didn't -- he didn't solicit me directly. I
21 remember Janet, and I remember either Richard North or
22 Civarella.

23 Q. Richard North?

24 A. I think so. Why?

25 Q. He's an attorney for Bard, defending them in

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1 this litigation?

2 A. Correct.

3 Q. Right. All right. And was your contact with
4 Richard North relating to one of those cases identified on
5 your case list?

6 A. It was not.

7 Q. Okay.

8 A. That was -- As I recall, he contacted me about
9 the phone conversations with helping physicians --

10 Q. All right.

11 A. -- is what I recall.

12 Q. Okay. So the context with respect to that
13 contact would have been he or somebody acting as an
14 intermediary where you would be asked to speak with
15 another physician who is having a problem with a filter?

16 A. Correct.

17 Q. And you would troubleshoot that issue with that
18 physician?

19 A. Correct.

20 Q. Would you prepare a report regarding your
21 interaction with that other physician?

22 A. Yes. Generally, as what I recall Richard North
23 asking me to do is --

24 MR. BROWN: Hang on one second.

25 Were you a retained consultant for Bard at the time

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1 that you were contacting Richard North?

2 THE WITNESS: I believe I might have been
3 because I --

4 MR. JOHNSON: Let me rephrase the question.

5 Q. I don't want to know what Richard North told
6 you. I want to know what your interaction was with a
7 third-party physician who was having a problem with a
8 filter.

9 A. What was my --

10 Q. Involvement with that physician.

11 A. I was asked to give advice about particular
12 cases. Usually it was about retrievals, difficult
13 retrievals.

14 Q. All right. But the communications and the
15 advice that you gave would have been with that physician
16 who was treating a patient?

17 A. Correct.

18 Q. And did you consider yourself to be a -- a
19 consultant giving a second opinion to a physician having a
20 problem with a filter?

21 A. I would say yes.

22 Q. And would you prepare what amounts to a progress
23 note of your advice that you gave to that physician?

24 A. I did. Yeah.

25 Q. Much the same as a progress note that you would

Page 314

1 make if one of your colleagues at one of your hospitals
2 asked you for your advice relating to a problem with a
3 filter?

4 MR. BROWN: Object to the form.

5 THE WITNESS: Correct.

6 BY MR. JOHNSON:

7 Q. All right. Were you also a trainer for Bard,
8 that is, did you train other physicians on how to implant
9 the filter and explant filters?

10 A. Yes.

11 Q. All right. With regard to the report that you
12 prepared for this litigation, does it set forth your
13 opinions within a reasonable degree of medical
14 probability?

15 A. Yes.

16 Q. All right. And you told us that you were first
17 retained in this litigation in December of 2016 or January
18 of 2017?

19 A. I -- I kind of recall January, but I could be
20 wrong about that.

21 Q. There is a list in your report of Bard
22 documents. Do you recall that?

23 A. Yes.

24 Q. And do you recall reviewing all of those
25 documents?

EXHIBIT B

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13 UNITED STATES DISTRICT COURT

14 DISTRICT OF ARIZONA

15 In Re Bard IVC Filters Products
16 Liability Litigation

17 No. MD-15-02641-PHX-DGC

18 **DECLARATION OF RAMON ROSSI
19 LOPEZ IN SUPPORT OF SURREPLY IN
20 OPPOSITION TO DEFENDANTS'
21 MOTION TO DISQUALIFY THOMAS
22 KINNEY, M.D. AS AN EXPERT FOR
23 PLAINTIFFS**

24 I, Ramon Rossi Lopez, declare under the penalty of perjury under the laws of the
25 United States of America as follows:

26 1. I am an adult person over eighteen years over eighteen (18) years of age
27 residing in Orange County, California.

28 2. I am an attorney duly licensed to practice law in the State of California. I am
29 admitted *pro hac vice* in the above captioned matter and I am a partner of Lopez McHugh,
30 LLP and Co-Lead Counsel for *In re Bard IVC Filter Products Liability Litigation*, MDL
31 No. 2641.

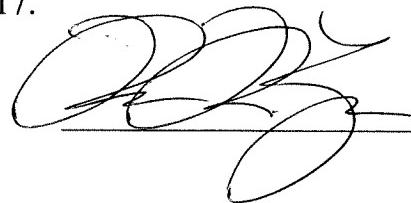
32 3. In my role as Co-Lead Counsel in this MDL, I have worked with Thomas
33 Kinney, M.D., who is an expert witness for Plaintiffs in this action.

34 4. I attended Dr. Kinney's deposition in this action on June 17, 2017, and I
35 have received from Dr. Kinney a draft errata sheet for that deposition. The errata sheet is
36 due on July 17, 2017 and is not yet final.

1 5. In his errata sheet, Dr. Kinney noted the following supplementation to his
2 testimony at page 313, lines 2-1 should read: "Richard North did not contact me directly
3 with the individual cases. It was a Bard Staff Member who would get me in contact by
4 phone with a clinician with a specific clinical question."

5 I declare under penalty of perjury that the foregoing is true and correct.

6 EXECUTED this 12th day of July 2017.

A handwritten signature consisting of several loops and curves, appearing to be a stylized 'B' or similar letter, followed by a horizontal line.

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